

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EON-NET L.P.,

Plaintiff,

v.

FLAGSTAR BANCORP,

Defendant.

CASE NO. C05-2129 RSM

**MOTION PURSUANT TO CR 7(h) FOR
RECONSIDERATION OF THE ORDER
ON MOTION FOR FEES AND COSTS**

**NOTE ON MOTION CALENDAR:
JANUARY 18, 2010**

1 Plaintiff Eon-Net, L.P. files this Motion for Reconsideration of the Court's Order
2 on Motion for Fees and Costs as the Court appears to have misapprehended various facts
3 in this case to arrive at its decision. Specifically, as demonstrated below, this case is not
4 exceptional and therefore does not warrant sanctioning either plaintiff or its counsel. Eon-
5 Net's claim construction is not baseless as to the claim that the patents-in-suit cover
6 processing information not derived from scanned hard copy documents, and plaintiff's
7 purpose in filing this suit was not improper. Further, neither plaintiff nor its counsel
8 destroyed any non-public or otherwise relevant documents in this or any other litigation,
9 nor did they engage in any improper litigation techniques.

10 1. The Patents-in-Suit and Infringement

11 The three Eon-Net patents-in-suit cover processing information that does not
12 originate from scanned hard copy documents. The U.S. Patent and Trademark Office
13 ("PTO") recently confirmed this by allowing U.S. Patent Nos. 7,570,383 ("the '383
14 patent") and 7,619,768 ("the '768 patent") based on the same specification as the Eon-
15 Net patents. These two new patents have claims explicitly directed towards processing
16 information that is not derived from scanned hard copy documents. Dkt. # 187-2 and 3.
17 For example, claim 3 of the '383 and '768 patents recites a method of processing
18 information in a file "wherein said file is not derived from scanning a hard copy
19 document".

20 After the Court issued its Order on Claim Construction on March 4, 2009
21 ("Order") and before the '383 patent issued, Eon-Net submitted the Order to the PTO and
22 requested that it be considered before the PTO issue the '383 patent. Reconsideration
23 Declaration of Mitchell Medina ("Medina Reconsideration Decl."), ¶1. The PTO
24 considered the Order and issued the '383 patent anyway. *Id.* The PTO then subsequently
25 issued the '768 patent, Dkt. # 187-3, demonstrating its belief, notwithstanding the Order,
26 that the patent specification common both to the Eon-Net patents and to the '383 and
27 '768 patents supports Eon-Net's claim construction. On January 8, 2010, the PTO
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1 allowed yet another patent application based on the same specification, having claims,
2 e.g., claim 57, also directed towards processing information from documents that do not
3 originate from scanned hard copy documents. Medina Reconsideration Decl., ¶2.
4 Accordingly, Eon-Net's claim construction was and is proper and the Court should
5 therefore vacate its Order on Motion for Fees and Costs.

6 2. The Purpose of Eon-Net's Suit Was Proper

7 Since Eon-Net's claim construction was not just reasonable but, as recently
8 confirmed by the PTO, correct, and since, as the Federal Circuit previously found, there
9 is support in the specification for such construction, and its counsel conducted a proper
10 pre-suit investigation, Dkt. # 105, pp. 12-13, Eon-Net's efforts to license the patents-in-
11 suit to Flagstar were proper. The number of third parties to whom Eon-Net and
12 Millennium have licensed their patents, and the amounts for which they have done so, are
13 irrelevant to this case. There is no law that dictates how many entities a patentee may
14 license or what they must charge for a license. Nor, as the Federal Circuit held, are Eon-
15 Net's actions in seeking to license the patent improper simply because Eon-Net's patent
16 is broad in scope. *Id.* at pp. 13-14. Accordingly, as Eon-Net's purpose in litigating this
17 case was proper, the Court should vacate its Order on Motion for Fees and Costs.

18 3. Neither Eon-Net Nor its Counsel Destroyed Relevant Documents

19 Neither Eon-Net nor its undersigned counsel destroyed any relevant documents in
20 this case. The only documents Eon-Net's counsel discarded are publicly available and/or
21 immaterial or irrelevant documents. Dkt. #144, pp. 5-6 and 179, pp. 11-12. The
22 statement by undersigned counsel during Mr. Medina's deposition that he discarded "the
23 documents" received in the ReadSoft case from Millennium's prior counsel was a
24 reference to having discarded public documents and other non essential documents, e.g.,
25 invoices for travel to San Diego, copy service invoices, etc., pertaining to that litigation,
26 none of which are relevant to this case. Reconsideration Declaration of Jean-Marc
27 Zimmerman ("Zimmerman Reconsideration Decl."), ¶2. *See also* Dkt. # 144-2, 179-1.

1 Examination of the deposition transcript immediately preceding the aforementioned
2 quote indicates that Flagstar's counsel was questioning Mr. Medina about the existence
3 of a draft specification that may have existed. Zimmerman Reconsideration Decl., ¶3.
4 The transcript also indicates that undersigned counsel advised Flagstar's counsel that the
5 prosecution files – including any draft specification - were not in his possession but in the
6 possession of Eon-Net's prosecution counsel, Foley & Lardner. *Id.*, ¶4. Further, Mr.
7 Medina testified that he “never deliberately took something and threw it [out]” and that
8 any prosecution-related documents he may have had were inadvertently lost in the course
9 of his moves between the United States, Kenya and Israel. Medina Reconsideration Decl.,
10 ¶3.

11 Accordingly, since neither Eon-Net nor its counsel destroyed any non-public or
12 material or relevant documents in this case, and since Flagstar has failed to identify a
13 single document much less a relevant one that was purportedly destroyed, the Court
14 should vacate its Order on Motion for Fees and Costs.

15 4. Neither Eon-Net Nor its Counsel Has
16 Engaged in Improper Litigation Tactics

17 Neither Eon-Net nor its counsel engaged in any improper litigation techniques.
18 As shown below, the Court misapprehended numerous facts to arrive at its conclusion that
19 they did.

20 Eon-Net's position that no claim terms had to be construed since such terms have
21 their ordinary and customary meaning was not improper and is often asserted by
22 patentees. In any event, Eon-Net ultimately identified terms to be construed and
23 provided their proposed constructions to Flagstar and the parties proceeded with the
24 claim construction process, i.e., preparing and filing a joint claim chart and submitting
25 their respective briefs. Dkt. # 131, 134, 136 and 141.

26 Mr. Medina's testimony that Eon-Net had no documents responsive to Flagstar's
27 claim construction-related requests for production referred to the fact that such
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1 documents are in the possession of Eon-Net's counsel rather than in the possession of
2 Eon-Net which has no office or employees. Dkt. #144, pp. 5-7. Eon-Net's counsel
3 produced many non-public documents – letters sent to alleged infringers, claim charts
4 prepared for alleged infringing websites, discovery requests sent to alleged infringers,
5 and responses to discovery requests received from alleged infringers – in response to
6 Flagstar's requests. *Id.*, p. 7. Thus, responsive documents exist and were produced.

7 There was no systematic destruction of documents by either Eon-Net or its
8 counsel. Dkt. # 144, pp. 5-6 and 179, pp. 11-12. Nor, as already mentioned, did
9 undersigned counsel discard “all the documents relevant to the earlier patents”, or destroy
10 documents evidencing the “inventors’ process in filing the continuation patents assigned
11 to Eon-Net”. Rather, undersigned counsel discarded publicly available and other
12 immaterial and irrelevant documents pertaining to prior concluded litigations, as per his
13 firm's practice. Dkt. # 144, p. 5. Undersigned counsel never discarded a draft
14 specification or any documents pertaining to the prosecution of the Millennium or Eon-
15 Net patents, since those documents were in the possession of Eon-Net's prosecution
16 counsel and not in the possession of undersigned counsel. Zimmerman Reconsideration
17 Decl., ¶4. Undersigned counsel queried Eon-Net's prosecution counsel about the
18 existence of the draft specification and other non-public prosecution-related documents
19 and was advised that they did not have any. *Id.*, ¶5. In any event, as the Court noted, the
20 purported destruction of certain unspecified documents did not “hinder” Flagstar in
21 presenting successful arguments in the *Markman* proceedings.

22 Eon-Net has never sought to evade a careful analysis of the claim terms through
23 the *Markman* proceeding. Eon-Net put forth proposed constructions for the terms
24 identified in the joint claim construction chart, and submitted briefs in support of its
25 constructions. Dkt. #131, 134, 136 and 141. The fact that Flagstar submitted over 1700
26 pages of mostly extrinsic evidence in support of its constructions – many of which were
27 public documents, and claim construction-related documents provided by Eon-Net –
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1 while Eon-Net submitted several pages from *Que's Computer User Dictionary* ("*Que's*")
2 to support its constructions does not demonstrate that Eon-Net's construction was
3 improper and Flagstar's proper.

4 Eon-Net provided the dictionary definitions to support its contention that an
5 individual skilled in the art such as a computer scientist with an advanced degree, would
6 understand the terms "document" and "file" as used in the specifications of the patents-
7 in-suit to have their ordinary and customary constructions put forth by Eon-Net. The
8 Court's assertion that Eon-Net intentionally omitted providing a definition from *Que's*
9 for "document" is unfounded. There was no definition for said term in the edition of
10 *Que's* from which Eon-Net submitted a definition for "documentation", which supports
11 Eon-Net's construction of "document". Dkt. # 141-2, Exhibit 2, p. 9. *Que's* was cited by
12 Eon-Net because it was intrinsic evidence, having been cited to the PTO by the inventors
13 in 1991 when the common specification was filed. Medina Reconsideration Decl., ¶4.

14 The Court is incorrect in contending that Mr. Medina and Ms. Elias agreed with
15 Flagstar's constructions. Rather, both Mr. Medina and Ms. Elias made clear in their
16 deposition testimony that they believe that the patents-in-suit cover processing
17 information from documents that do not originate from scanned hard copy documents.
18 Dkt. #141-3 and 4. The Court has not and cannot point to any deposition testimony by
19 these individuals supporting Flagstar's constructions.

20 Notwithstanding Flagstar's assertion to the contrary, the attorney for Kofax
21 confirmed that licensed Kofax software is not used on the Flagstar website. Dkt. # 179,
22 pp. 6-7.

23 Finally, undersigned counsel never sought to disclaim responsibility for the error
24 in sending out the incorrect interrogatory response regarding the requisite level of skill in
25 the art in the BCF case. Rather, he was simply attempting to explain the mechanics of
26 how it happened. Zimmerman Reconsideration Decl., ¶6. In any event, Eon-Net never
27 adopted the position put forth in the BCF response in this case as it retained an expert
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1 having the requisite level of skill in the art to analyze the claim terms at issue and prepare
 2 the expert report it submitted as part of the *Markman* proceeding. Dkt. # 141-2, Exhibit
 3 2.

4 CONCLUSION

5 Eon-Net's claim construction was reasonable and not baseless, as shown again by
 6 the PTO's recent allowance of the '383 and '768 patents and now a third patent, after it
 7 considered this Court's Claim Construction Order. The Court misapprehended many
 8 facts regarding the purported destruction of unidentified documents, which destruction
 9 never occurred, and the supposedly improper, yet in reality unexceptional, litigation
 10 conduct of Eon-Net and its counsel. The Court's Order on Motion for Fees and Costs
 11 appears to be based upon its objection to the broad scope of the patents-in-suit as asserted
 12 by Eon-Net, and its dislike of and objection to Eon-Net's business model, which involves
 13 filing many suits seeking relatively moderate license fees. However, these are improper
 14 grounds for sanctioning Eon-Net or its counsel. Given the reasonableness of Eon-Net's
 15 claim construction and its conduct, this not an exceptional case and does not warrant the
 16 imposition of any kind of sanction.

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